



FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

MAR 23 2007

Lyn Utrecht
Ryan, Phillips, Utrecht & MacKinnon
1133 Connecticut Avenue, N.W., Suite 300
Washington, D.C. 20036

RE: MUR 5761
Patricia Madrid; Justice for America; and
Madrid for Congress and Rita Longino, in
her official capacity as Treasurer

Dear Ms. Utrecht:

On June 21, 2006, the Federal Election Commission notified your clients, Patricia Madrid, Justice for America, and Madrid for Congress and Rita Longino, in her official capacity as Treasurer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On March 19, 2007, the Commission found, on the basis of the information in the complaint and information provided by your clients, that there is no reason to believe your clients violated 2 U.S.C. §§ 441a, 441b, 441i(e) or 434(b). Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. *See* Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). A copy of the Factual and Legal Analysis explaining the Commission's decision is enclosed for your information.

If you have any questions, please contact Tracey L. Ligon, the attorney assigned to this matter at (202) 694-1650.

Sincerely,

Thomaseia P. Duncan
Acting General Counsel

A handwritten signature in black ink, appearing to read "Rhonda J. Vosdinger".

BY: Rhonda J. Vosdinger
Associate General Counsel
for Enforcement

Enclosure
Factual and Legal Analysis

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1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3
4 **RESPONDENTS:** Madrid for Congress and Rita Longino, in **MUR: 5761**
5 her official capacity as Treasurer
6 Patricia Madrid
7 Justice for America
8

9 **I. INTRODUCTION**

10 This matter was generated by a complaint filed with the Federal Election Commission by
11 Senator Pete Domenici, Congressman Steve Pearce, and Congresswoman Heather Wilson
12 alleging a violation of the Federal Election Campaign Act of 1971 ("the Act"), as amended by
13 the Bipartisan Campaign Reform Act of 2002 ("BCRA"), by Madrid for Congress and Rita
14 Longino, in her official capacity as Treasurer, Patricia Madrid, and Justice for America.

15 **II. FACTUAL AND LEGAL ANALYSIS**

16 Patricia Madrid was the Attorney General for the State of New Mexico. On October 18,
17 2005, Ms. Madrid announced her candidacy for a seat in the United States House of
18 Representatives for New Mexico's 1st Congressional District. The complaint alleges that Ms.
19 Madrid violated 2 U.S.C. § 441i(e) based on allegations that: (1) Justice for America, a State
20 political action committee founded by Ms. Madrid ("JFA"), did not go dormant after Ms. Madrid
21 declared her candidacy for Federal office; and (2) while she was a candidate for Federal office,
22 Ms. Madrid retained control of the non-Federal funds of JFA through her husband, L. Michael
23 Messina, who is listed in public documents as the President of JFA. In addition, the complaint
24 alleges that JFA and Ms. Madrid violated the Act by using JFA's funds for the purpose of
25 "testing the waters."

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1 In a joint response, Ms. Madrid, Madrid for Congress and Rita Longino, in her official
2 capacity as Treasurer ("the Committee"), and Justice for America argue that the complaint is
3 purely speculative and should be dismissed.

4 **III. FACTUAL AND LEGAL ANALYSIS**

5 **A. Allegation That Ms. Madrid Violated Section 441i(e) Because**
6 **JFA Did Not Become Dormant After She Became a Candidate**

7
8 The Act, as amended by BCRA, prohibits Federal candidates and officeholders, any
9 "agent of a candidate or an individual holding Federal office," or any entity established,
10 financed, maintained or controlled by a Federal candidate from soliciting, receiving, directing,
11 transferring or spending funds in connection with an election for Federal office, including funds
12 for Federal election activity, unless the funds are subject to the limitations, prohibitions and
13 reporting requirements of the Act. 2 U.S.C. § 441i(e)(1)(A).

14 The complaint alleges that Ms. Madrid, as the founder/establisher of JFA, violated
15 Section 441i(e) because, according to the complaint, JFA did not become dormant after Ms.
16 Madrid became a candidate for Federal office. The complaint questions whether Ms. Madrid had
17 any role in soliciting or directing JFA's non-Federal funds after she became a candidate. In
18 response to the complaint, the respondents assert that ever since Ms. Madrid became a Federal
19 candidate on October 18, 2005, she had no involvement in JFA, and that, to avoid any suggestion
20 of impropriety, JFA ceased active operations immediately after she filed her Statement of
21 Candidacy.

22 Respondents' assertion that JFA became dormant after Ms. Madrid declared her
23 candidacy on October 18, 2005 is largely supported by available information. JFA's public
24 filings reflect that it received no contributions after that date. The filing does, however, list two
25 receipts on April 21, 2006 – \$50 from Madrid for Congress for "reimburse for donor list," and

1 \$5,995 from Integrity Networking Systems, Inc. for “(reimbursement, not contribution).”
2 Respondents explain that the \$5,995 reimbursement stemmed from an accounting error that
3 resulted in JFA overpaying an invoice. The \$50 from Madrid for Congress appears to be a
4 payment for a donor list rather than a reimbursement. The notation on the memo line of the
5 check from Madrid for Congress, as well as the Committee’s FEC disclosure report, states
6 simply “donor list.” However, \$50 for JFA’s donor list is negligible and is consistent with
7 Respondents’ assertion that JFA was no longer active or was winding down. Also, while the
8 complaint notes that Madrid for Congress’ pre-primary report reflects an \$80 debt to JFA for
9 photography (payment for one photograph of Ms. Madrid), this is not inconsistent with JFA’s
10 apparent winding down.

11 Likewise, JFA’s disbursements following October 18, 2005, were few and consistent
12 with an entity that is largely inactive. Specifically, JFA’s State filing reflects that the
13 disbursements were: (1) \$29 to Wells Fargo New Mexico for a stop payment on a check written
14 before October 18; (2) \$1.96 to Wells Fargo New Mexico for state sales tax; (3) payments for
15 \$500 on December 5, 2005, and \$33.75 on January 17, 2006 for computer services invoiced prior
16 to October 18, 2005; and (4) the \$49.64 payment for “conference call” on January 17, 2006.

17 Based on the foregoing, JFA appears to have ceased active operations after Ms. Madrid
18 filed her Statement of Candidacy. Further, there is no information that Ms. Madrid continued
19 any role with JFA after announcing her candidacy for Federal office.

20 **B. Allegation that Ms. Madrid Violated Section 441j(e) By Retaining Control of**
21 **JFA After Becoming a Candidate By Virtue of Her Husband’s Position as**
22 **President of JFA**
23

24 The complaint further alleges that, even if JFA did go dormant, Ms. Madrid still
25 impermissibly retained control of JFA’s non-Federal funds after she became a candidate by

1 virtue of the fact that her husband, L. Michael Messina, serves as the President of JFA. In
2 response to this allegation, Respondents assert that Ms. Madrid's husband's role as
3 president/chairperson of JFA does not constitute a violation of the Act.

4 The Commission agrees. Ms. Madrid's husband's continued relationship with JFA,
5 alone, is insufficient to create an agency relationship by which control of JFA could be imputed
6 to Ms. Madrid. The Commission addressed a similar situation in Advisory Opinion 2003-10,
7 where the requester asked whether he could solicit non-Federal funds for the Nevada State
8 Democratic Party even though he is the son of a Federal candidate and officeholder. The
9 Commission concluded that the requester was not an "agent" of the officeholder solely because
10 they are father and son. The Commission explained that the definition of agent is limited to a
11 person acting pursuant to "actual authority" from the Federal candidate or officeholder, and that
12 it is not enough that there is some relationship or contact between the principal and agent, the
13 agent must be acting on behalf of the principal to create potential liability for the principal. *See*
14 Advisory Opinion 2003-10 (Rory Reid and the Nevada State Democratic Party). The
15 complainant alleges no facts indicating that Ms. Madrid's husband did anything with respect to
16 JFA pursuant to "actual authority" from her.

17 C. **Allegation That Ms. Madrid Improperly Used JFA Funds**
18 **To Test The Waters Prior To Becoming A Candidate**
19

20 Based on disclosure reports filed by Justice for America with the State of New Mexico,
21 the complaint alleges that Ms. Madrid violated the Act by using JFA's non-Federal funds to
22 (1) reimburse Ms. Madrid's expenses for travel, postage, computer and other supplies related to
23 her Federal candidacy (JFA made 15 reimbursements for such expenses totaling \$3,298.99), and
24 (2) pay approximately \$17,000 for, *inter alia*, polling and surveys conducted by Lake, Snell,

1 Perry & Mermin, a consulting firm that Ms. Madrid's Federal campaign later paid to perform
2 similar surveys. The payments to Lake, Snell, Perry & Mermin were as follows:

- 3 • JFA paid \$7,560.63 on June 29, 2005, for "consulting services"
- 4 • JFA paid \$7,000 on September 13, 2005, for survey expenses
- 5 • JFA paid \$2,550 on September 13, 2005, for "travel expenses incurred
6 surrounding the [JFA] forum" on August 13, 2005
- 7 • JFA paid \$49.64 on January 17, 2006, for "conference calls"
- 8

9 The complaint alleges specifically that if JFA's payments to Lake, Snell, Perry &
10 Mermin constituted testing the waters disbursements, Ms. Madrid violated the Act by using
11 JFA's non-Federal funds to pay for them. In response, the Respondents assert that all JFA
12 reimbursements to Ms. Madrid were incurred solely on behalf of JFA, and all JFA disbursements
13 to Lake, Snell, Perry & Mermin were for JFA activities only and had nothing to do with testing
14 the waters for Ms. Madrid's Federal candidacy.

15 Under 2 U.S.C. § 431(2)(A), an individual is deemed to be a "candidate" for purposes of
16 the Act if he or she receives contributions or makes expenditures in excess of \$5,000.

17 *Explanation and Justification for Regulations on Payments Received for Testing the Waters*
18 *Activities*, Fed. Reg. 50 F.R. 9992 (March 13, 1985). The Act thus establishes automatic dollar
19 thresholds for attaining candidate status, which trigger its registration and reporting
20 requirements. *Id.* Through its regulations, the Commission has established limited exceptions to
21 these automatic thresholds, which permit an individual to test the feasibility of a campaign for
22 Federal office without becoming a candidate under the Act. *Id.* Commonly referred to as the
23 "testing the waters" exceptions, 11 C.F.R. §§ 100.72 and 100.131 exclude funds received and
24 payments made to determine whether an individual should become a candidate from the
25 definitions of "contribution" and "expenditure." Under the regulations, "testing the waters"
26 activities include, but are not limited to, payments for polling, telephone calls, and travel. The

1 regulations further state, however, that only funds permissible under the Act may be used for
2 such activities. *See* 11 C.F.R. § 100.131(a). In addition, if an individual subsequently becomes a
3 candidate, the funds received and payments made become “contributions” and “expenditures”
4 and are subject to the reporting requirements of the Act. *See Id.*; 2 U.S.C. § 434(b).

5 Of the \$3,298.99 JFA paid in reimbursements to Ms. Madrid and the approximately
6 \$17,000 JFA paid to Lake, Snell, Perry & Mermin, only the \$7,000 payment to the firm for
7 survey/poll expenses merits further consideration. JFA denies that any of the disbursements had
8 anything to do with testing the waters, and we have no information to the contrary with respect to
9 JFA’s reimbursements to Ms. Madrid and its payments to the firm of \$7,560.63 for consulting
10 services, \$2,550 for “travel expenses incurred surrounding the [JFA] forum, or \$49.64 for
11 “conference calls.” Indeed, the temporal proximity to Ms. Madrid’s announcement of her
12 candidacy is the sole factual basis offered for the complaint’s allegation.

13 The invoice associated with JFA’s payment for survey expenses, however, reflects that
14 the consulting firm may have believed the survey was being conducted, at least in part, in
15 connection with Ms. Madrid’s Federal candidacy as the \$7,000 was billed to “Madrid For
16 Congress.” Moreover, the survey was conducted just one month prior to Ms. Madrid’s
17 declaration of candidacy, which, together with the designation on the invoice, suggest, in the
18 absence of other information, that the poll may have been “testing the waters” activity conducted
19 to determine the feasibility of a run for Congress, that could only be paid for with funds subject
20 to the limitations and prohibitions of the Act pursuant to 11 C.F.R. §§ 100.72(a) and 100.131(a).¹
21 If the poll was Federal testing the waters activity, then once Ms. Madrid became a candidate, the
22 costs of the poll would have become an in-kind contribution from JFA to Madrid for Congress

¹ *See, e.g.* MUR 5722 (Friends for Lauzen) (concluding that the Federal portion of an exploratory poll used in part to test the waters for a possible Federal candidacy could only be paid for with Federally permissible funds)

1 that should have been disclosed by Madrid for Congress in its first disclosure report filed with
 2 the Commission. Further, if the Federal portion of the poll exceeded the applicable contribution
 3 limit or JFA did not have sufficient Federal funds to pay for the cost of the poll, then JFA and
 4 Ms. Madrid could potentially be in violation of 2 U.S.C. § 441i(e) and either 2 U.S.C. § 441a or
 5 441b, or both.²

6 Respondents argue, however, that during the fall of 2005, Ms. Madrid considered running
 7 for various other state offices, and commissioned the poll to test her viability in those state races,
 8 not in any Federal race. They further argue that the poll did not ask any questions that would
 9 benefit her as a candidate in any Federal election. The survey contained the following 18
 10 questions:

- 11 1. When you registered (to vote), did you register as a Democrat, as a Republican,
- 12 with another party, or are you not affiliated with any party?
- 13 2. What are the chances of your voting in the 2006 June Democratic Primary
- 14 election for Governor, Congress, and other offices
- 15 Do you have a VERY favorable, SOMEWHAT favorable, somewhat
- 16 UNFAVORABLE, or VERY unfavorable impression of . . .
- 17 3. Patricia Madrid?
- 18 4. Diane Denish [Lieutenant Governor]
- 19 5. Bill Richardson [Governor]
- 20 6. How would you rate the job being done by Bill Richardson as Governor of New
- 21 Mexico – EXCELLENT, GOOD, JUST FAIR, or POOR?
- 22 7. How would you rate the job being done by Patricia Madrid as Attorney General of
- 23 New Mexico – EXCELLENT, GOOD, just FAIR, or POOR?
- 24 8. How would you rate the job being done by Diane Denish as Lieutenant Governor
- 25 of New Mexico – EXCELLENT, GOOD, just FAIR, or POOR?
- 26 9. Thinking about the election in 2006 for Governor, do you think you will vote to
- 27 RE-ELECT Bill Richardson, will you consider voting for SOMEONE ELSE, or
- 28 do you think you will vote to REPLACE him?
- 29 10. And if the 2006 Democratic Primary for Lieutenant Governor were held today,
- 30 and the candidates were Patricia Madrid and Diane Denish, for whom would you
- 31 vote, or are you undecided?
- 32 11 – 12

² Cf MUR 5480 (Levetan) (concluding that once Ms. Levetan became a candidate, her state campaign committee's payment for a poll during the testing the waters period became an in-kind contribution from the state campaign committee to the Federal campaign committee in violation of 2 U.S.C. § 441i(e) and 11 C.F.R. § 110.3(d)).

1 The interviewee is asked how he or she would respond if "Governor Bill
2 Richardson endorses Diane Denish in the primary election for Lieutenant
3 Governor," or "opposes Patricia Madrid's bid for Lieutenant Governor" – would
4 he or she be MUCH MORE likely, SOMEWHAT more likely, LESS LIKELY, or
5 MUCH LESS likely to vote for Patricia Madrid or doesn't it make any difference?
6 13. Generally speaking, do you consider yourself very LIBERAL, SOMEWHAT
7 liberal, MODERATE, somewhat CONSERVATIVE, or VERY conservative?
8 14. What is your age?
9 15. What is the last year of schooling that you have completed?
10 16. What is your race?
11 17. What is your zip code?
12 18. May I have just your first name?

13 Of the questions contained in the poll, five are demographic (questions 14 - 18); eight appear to
14 have been distinctly designed to aid in determining whether Ms. Madrid should become a
15 candidate for Governor or Lieutenant Governor of New Mexico (questions 4, 5, 6, 8, 9, 10, 11,
16 and 12); and three are generic: one asks about the responding person's party affiliation (question
17 1), one asks about the responding person's ideological characterization (question 13), and one
18 asks about the likelihood that the responding person would vote in the June 2006 "primary
19 election for Governor, Congress ..." (question 2). The remaining two questions ask about the
20 responding person's impression of Ms. Madrid (questions 3 and 7), although, in context, these
21 questions appear designed to compare the responder's impressions of Ms. Madrid against the
22 responder's impressions of other candidates for State office.

23 The overwhelming content of the poll is wholly consistent with Respondent's assertion
24 that Ms. Madrid commissioned a poll to test her viability in certain State races. There is only
25 one question in the poll that mentions a Federal election at all (question 2), and, in that instance,
26 the poll questions only generically whether the responder would vote in the primary election for

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1 Governor or for "Congress." Thus, the survey expenses do not appear to have been made for the
2 purpose of testing the waters for Ms. Madrid's Federal candidacy.³

3 **D. Conclusions**

4 Based on the foregoing analysis, there is no reason to believe that Justice for America,
5 Ms. Madrid or Madrid for Congress and Rita Longino, in her official capacity as Treasurer,
6 violated 2 U.S.C. § 441i(e) by soliciting, receiving, directing, transferring or spending non-
7 Federal funds in connection with an election for Federal office. In addition, there is no reason to
8 believe that Justice for America or the Committee violated 2 U.S.C. §§ 441a or 441b by making
9 or receiving excessive or prohibited contributions, or that the Committee violated 2 U.S.C.
10 § 434(b) by failing to disclose Federal testing the waters activity in its first disclosure report filed
11 with the Commission.

12
13
14

³ Even if the poll was Federal testing the waters activity. JFA had sufficient Federally permissible funds to cover the \$7,000 disbursement. In its 2006 Report filed with the New Mexico Secretary of State, JFA reported \$126,361.70 in cash on hand at the beginning of the reporting period. During the reporting period, JFA received \$35,550 in Federally permissible funds prior to making the \$7,000 disbursement for the poll on September 13, 2005, and had expended only \$81,334 by that time. Based on a "First In, First Out" accounting method, the \$126,361.70 available at the beginning of the reporting period would have been used for the \$81,334 in disbursements JFA made prior to September 13th. That left \$45,028 remaining from the beginning cash on hand plus \$35,550 in Federally permissible funds received during the reporting period available to cover JFA's \$7,000 disbursement for the poll.